



STATE OF VERMONT
DEPARTMENT OF EDUCATION
120 State Street
Montpelier, VT 05620-2501

To: Superintendents, Principals and Special Education Directors

From: Karin Edwards, Director of Student Support Services

Date: September 1, 2006

Re: Vermont's New Special Education Due Process System

The Vermont Department of Education (DOE) is pleased to announce the roll-out of the new special education due process system that went into effect with the adoption of the revised Vermont Special Education rules effective August 24, 2006. Although consistent with the direction of the reauthorized IDEIA, these changes were in response to Vermonters - both school representatives and parent representatives - wanting to improve the current due process system in Vermont.

The changes focus primarily on due process, but also include some changes to special education mediation. The intent of the changes is two part: (1) to encourage the use of mediation or the new federal "resolution session" which is a meeting between the school district and the parent to identify disputed issues and provide opportunity for the parties to resolve the matter without having to proceed to a hearing and (2) if either mediation or resolution session is unsuccessful, to contain costs for parties and shorten the timeframe for concluding due process hearings. As adopted, the new due process rules emphasize *pre-hearing exchange of information*, use of affidavits, and focusing of issues so that two-day hearings become the standard and decisions are issued within the 45-day timeframe.

This memo provides information on the following:

1. What Should the School Expect Prior to and Upon Receipt of Complaint
2. How to Prepare for the Initial Telephone Conference Call
3. What Happens if the School Did Not Provide Prior Written Notice Regarding an Issue Raised in the Complaint
4. Considering a Challenge to the Sufficiency of the Complaint
5. Preparing for the Pre-hearing Conference; Pre-Hearing Order
6. Last Steps for Disclosing Information Prior to the Hearing

7. What Happens if the Parties Reach Agreement Prior to the Hearing
8. What to Expect At and Following the Hearing

This memo highlights some of the key elements of the new due process rules *but is not a complete outline of either party's obligations in due process*. Please be sure to carefully review [Vermont State Board of Education \(SBE\) Manual of Rules and Practices Special Education Rules](#) on due process and related provisions on mediation for a full explanation of your obligations.

1. What Should the School Expect Prior to and Upon Receipt of Complaint

- The statute of limitations remains the same but worthy of noting. The date of the alleged action of dispute must have occurred within two years of the filing. However, if the parent is requesting funding for the tuition for a unilateral placement, the complaint must be made no more than 90 days after the placement. There are also exceptions to the time limits if the parent was not clearly informed of his/her rights or if there were certain misrepresentations made by the school district.
- On the day of receipt, the DOE legal administrator will confirm receipt of the complaint with the special education administrator or superintendent through fax or e-mail and a copy by first class mail.
- The DOE legal administrator will also contact the special education administrator to schedule the initial conference call. If the district may be represented by an attorney, it will need to determine his/her availability for the initial call. Or, at a minimum, be ready with its attorney's dates of availability for the pre-hearing conference and the hearing.
- As there is now a much higher standard for a hearing officer to grant an extension to the 45-day due process timeline, it is critical that the initial telephone conference call occur within the four days so as to not unnecessarily use up the parties' days to complete necessary steps to prepare for the hearing.

2. How to Prepare for the Initial Telephone Conference Call

- Within two business days of receiving the complaint, the DOE legal administrator will send a letter to both parties confirming the time and date for the initial telephone conference between the hearing officer and the parties. The telephone conference will be held no later than four business days after the receipt of the complaint.
- During the conference call, the hearing officer will explain two options, resolution session and mediation, and ask the school and the parents whether both want to hold a resolution session or a mediation.
- If both parties want to hold a resolution session, the hearing officer ask the parties to pick a date, time, participants and location while on the call.
- If the parties instead decide to go to mediation, the hearing officer will identify a date by which the mediation must occur. (After the conference call, the hearing officer will notify the DOE legal administrator to initiate the mediation scheduling process.)

- Regardless if the parties elect to go to a resolution session or mediation, the hearing officer will count out the days beyond the resolution period¹ and inform the parties of the dates for the pre-hearing conference, deadlines for exchange of information and the hearing.
- If the parties waive the resolution session and do not want to go to mediation, the hearing officer will have the parties confirm in writing their decision to waive and inform the parties of the date that the 45-day due process timeline will commence. The hearing officer will schedule the dates for the pre-hearing conference, deadlines for exchange of information and the hearing. (Note: If the school files for due process, there is no resolution period, thus the 45-day timeline begins on the date the complaint was received by the commissioner.)
- The hearing officer will inform the parties of the deadlines for the following: the school's response, a challenge to the sufficiency of the complaint, the detailed written statement and the opposing party's defenses.
- The hearing officer will explain options for parties considering the use of expert witnesses, as well as the use of affidavits.
- The hearing officer will follow up the initial telephone conference call with a scheduling order sent to the parties.

3. What Happens if the School Did Not Provide Prior Written Notice Regarding an Issue Raised in the Complaint

- The school is required to have already shared with the parent the explanation of why it proposed or refused to take the action raised in the parent's complaint, and will have provided supporting information. The DOE "Form 7" usually accomplishes this notice to the parent.
- If the school did not adequately provide this notice to the parents, the school must do so within 10 days of the receipt of the complaint.

4. Considering a Challenge to the Sufficiency of the Complaint

- Within 15 days of receipt of the complaint, the school may challenge the sufficiency of the complaint in writing to the hearing officer.
- No later than five days following receipt of a sufficiency challenge, the hearing officer will let the parties know if the complaint is sufficient to move forward. (Although this may not always be possible, the hearing officer may be able to send a faster response so that the parties may know the status of the complaint prior to the mediation.)
- If the hearing officer finds the complaint insufficient, the complaint may not move forward unless both parties agree to an amendment or if the hearing officer agrees to allow an amendment.

¹ The recently released federal IDEIA regulations go into effect on October 13, 2006. Any discrepancies between the new state rules and new federal regulations will be addressed through the state rule making process to commence later this fall. Although mediation outside the resolution period must not delay the right to a hearing, mediation may be used in lieu of a resolution session. When mediation is used in lieu of a resolution session, this allows for the use of a 30-day resolution period before the 45-day due process timeline commences. Note that the federal regulations also provide possible adjustments to the resolution period. The hearing officer will guide the parties through the timelines based on their decision to either go to a resolution session, a mediation, or waive the resolution session in a parent initiated complaint.

- If amended, the timelines for *the resolution session* and the resolution period start from the beginning.²

5. Preparing for the Pre-hearing Conference; Pre-hearing Order

- The pre-hearing conference is a face-to-face meeting of the hearing officer and the parties. Plan to be available for four hours. As in most instances each party will have one day to put on its case at the actual hearing, the pre-hearing conference is a critical step. It is a key point for the hearing officer and parties to focus the issues of the complaint and is critical to ensure a full and fair hearing.
- Certain steps need to occur prior to the pre-hearing conference:
 - If the parent filed the complaint, he/she must provide the school and the hearing officer a detailed written statement at least three days prior to the pre-hearing conference. Through this document, the parent will give the school and the hearing officer a more in-depth explanation of the issues raised in the original complaint.
 - At least one day before the pre-hearing conference, the school will provide the parent and the hearing officer with a written statement of any defenses. Through this document, the school will elaborate on its response to the parent's issues and supporting information. (If the school filed the complaint, these steps are reversed: In that instance, the school must provide a detailed written statement and the parent files the statement of any defenses.)
- At the pre-hearing conference, documents need to be exchanged as follows:
 - Each party must provide a preliminary witness list, including a summary of testimony expected from each witness.
 - Each party must provide a statement of facts that are not disputed.
 - The school must provide a binder of proposed core exhibits.
- Following the pre-hearing conference, the hearing officer will issue a pre-hearing order which will include a clear and specific identification of the issues to be heard, rulings on any motions heard, any decisions made about evidence or order of presentation, scheduling or other related matters.

6. Last Steps for Disclosing Information Prior to the Hearing

- Affidavits may be used to reduce time at the hearing for testimony. Keep in mind that the affidavit must be submitted in advance and the school's witness will have to be available for cross examination unless both parties agree that his/her presence is not necessary. Testimony may be in person or by phone.
- No later than five business days prior to the hearing, all evidence and any supplements to the school's witness list and core exhibits must be sent to the opposing party.

² A discrepancy between the new federal regulation 34 C.F.R. 300.508(d)(4) and the new language in VSBE Rule 2365.1.6.5(d) exists and the state rule will need to be amended to be consistent with the federal language. In the interim, the hearing officers will apply the federal language. In so far as the state rule could be construed as extending the statute of limitations pursuant to VSBE Rule 2365.1.6.1, it cannot be interpreted that way.

- At least five business days prior to the hearing, each party will disclose to the opposing party all evidence including:
 - Final witness list with a brief description of testimony.
 - All documents requested for admission into evidence.
- If neither party objects, exhibits will be shared with the hearing officer two business days prior to the hearing. Sharing exhibits in advance with the hearing officer can help him/her to be better prepared for the hearing and manage the hearing more efficiently.

7. What Happens if the Parties Reach Agreement Prior to the Hearing

- If the school and the parent reach an agreement prior to the hearing, the school must inform the hearing officer in writing that an agreement has been reached and include a written statement signed by both parties requesting the cancellation of the hearing and the dismissal of the case with prejudice.
- A legally binding written settlement agreement between the parties, whether reached through a resolution session, mediation or other means of negotiation between the parties, shall be enforceable as between the parties in the appropriate state court or federal court.

8. What to Expect At and Following the Hearing

- Each party is limited to one day to present its case, including questioning of any witnesses, unless the hearing officer determines that more time is necessary.
- The hearing officer will render a decision not later than 45 days after the resolution session, mediation or the parties written decision to waive the resolution session.
- Exceptions to the 45-day timeframe are not to be expected. Exceptions will be granted under limited circumstances when the delay does not negatively impact the student, create a financial burden for either party that outweighs the need for the delay *and* if the delay is determined necessary to provide either party adequate time to prepare its case.

As noted above, this memo only highlights some key elements to the new due process system. It is not a full description of all the rights and obligations of parties within due process.

We hope this memo will help as an introduction to the new special education due process rules and relevant sections of the mediation rules. Please carefully review the rules to guide you through due process.

In addition to this memo, please note that there are two [upcoming trainings](#) to learn more about the revised special education rules, including the sections discussed above.